No. 01-7115

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN S.A., ET AL.,
Plaintiffs-Appellants,

v.

F. HOFFMANN-LAROCHE, LTD., ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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No. 01-7115

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STATEMENT OF INTEREST

This brief is submitted in response to the Court's Order of March 7, 2003, inviting the Solicitor General to express the views of the United States.

QUESTION PRESENTED

Whether the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, provides jurisdiction under the Sherman Act over the claims of a foreign plaintiff injured by a conspiracy having direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, when the foreign plaintiff's claimed injury does not arise from those domestic effects.

STATEMENT

1. In the mid-1990s, the United States began investigating global price-fixing and market allocation conspiracies among domestic and foreign manufacturers and distributors of bulk vitamins ("vitamin companies"), in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pursuant to those conspiracies, cartel members sold billions of dollars' worth of vitamins in the United States and around the world. To date, the United States has negotiated plea agreements with twelve corporate defendants and thirteen individual defendants, obtaining fines exceeding $900 million—including the largest criminal fine ($500 million) ever obtained by the Department of Justice under any statute. Moreover, eleven of the thirteen individuals have received sentences resulting in imprisonment, while one defendant awaits sentencing. European Union, Canadian, and Australian authorities similarly have obtained record fines against the vitamin companies.[1]

In the wake of the government's investigation, private parties brought multiple suits against the vitamin companies, seeking treble damages and attorneys' fees (15 U.S.C. 1, 15, 26) stemming from overcharges paid as a result of the price-fixing conspiracy. In settlement of suits by some United States purchasers, the vitamin companies paid hundreds of millions of dollars. *In re Vitamins Antitrust Litig.*, No. 99-197 THF, 2000 WL 1737867 (D.D.C. Mar. 31, 2000).

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[1] Francisco Peiró, *Commission adopts eight new decisions imposing fines on hard-core cartels*, 1 Competition Policy Newsl. (European Comm'n), Feb. 2002, at 30-34 (over €855 million in fines), *available at* http://europa.eu.int/comm/competition/publications/cpn/cpn2002_1.pdf; Australian Competition & Consumer Comm'n, *Federal Court Imposes Record $26M Penalties Against Vitamin Suppliers* (Mar. 1, 2001), *available at* http://203.6.251.7/accc.internet/media/search/view_media.cfm?RecordID=267; Canadian Competition Bureau, *Fines in Order of Magnitude - Competition Act*, *available at* http://strategis.ic.gc.ca/SSG/ct01709e.html.

This case arises from claims by "foreign corporations domiciled in various foreign countries, who purchased vitamins abroad from the vitamin companies . . . for delivery outside the United States." Pet. App. A6.

2. The district court (Hogan, J.) dismissed the foreign plaintiffs' claims for lack of subject matter jurisdiction, holding that those plaintiffs had "not alleged that the precise injuries for which they seek redress here have the requisite domestic effects necessary to provide subject matter jurisdiction over this case" under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a. *Empagran, S.A.* v. *F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360, at *3 (D.D.C. June 7, 2001).[2] The district court explained that, although the foreign plaintiffs had alleged that "the conduct causing their injuries resulted in a 'direct, substantial, and reasonably foreseeable effect on U.S. commerce,'" the plaintiffs had not alleged

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[2] The FTAIA, which in 1982 became Section 7 of the Sherman Act, provides:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> [*Proviso*] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. 6a.

that "the effect providing the jurisdictional nexus . . . [was also] the basis for the injury alleged under the antitrust laws." *Id.* at *2 (citations omitted).[3]

3. A divided panel of this Court (Edwards, Henderson, and Rogers, JJ.) reversed and remanded. Pet. App. A1-A36. The court observed that "the Second and Fifth Circuits have split" on "the question whether the FTAIA requires that the plaintiff's claim arise from the U.S. effect of the anticompetitive conduct." *Id.* at A13. The court observed (*id.* at A13-A14) that the Fifth Circuit in *Den Norske Stats Oljeselskap As* v. *HeereMac Vof*, 241 F.3d 420, 427 (2001) (*Statoil*), *cert. denied*, 534 U.S. 1127 (2002), held that the FTAIA bars claims in which the plaintiff's injury does not stem from the conspiracy's anticompetitive domestic effects. By contrast, the Second Circuit in *Kruman* v. *Christie's International PLC*, 284 F.3d 384, 400 (2002), *petition for cert. pending*, No. 02-340 (filed Sept. 3, 2002), held that the FTAIA permits suit when the plaintiff's injury does not arise from the domestic effect of the conspiracy as long as a "domestic effect violate[s] the substantive provisions of the Sherman Act."[4]

The majority adopted a "view of the statute [that] falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. A19. The majority rejected the plaintiffs' argument—based on *Kruman*, 284 F.3d at 397-400—that the "FTAIA only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20. The majority nonetheless interpreted the phrase "gives rise to

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[3] Because the district court found subject matter jurisdiction lacking, it did not reach the defendants' alternative argument that the foreign plaintiffs lacked antitrust standing. *Empagran S.A.*, 2001 WL 761360, at *5.

[4] The parties in the *Kruman* case have reportedly agreed to settle their case. Brooke Barnes, *Sotheby's, Christie's to Settle Claims by Overseas Customers*, Wall St. J., Mar. 12, 2003, at B2.

a claim" in Section 6a(2) as requiring only that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." *Id.* at A19.

The majority also relied on the legislative history of the FTAIA and policy considerations to support its expansive interpretation of the Act. Acknowledging that portions of the sole relevant congressional committee report, H.R. Rep. No. 686 (1982), 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487 (House Report), support the Fifth Circuit's interpretation of the FTAIA, the majority believed it "most noteworthy . . . that the presence of legislative history that is consistent with the restrictive view does not (when read in context) denigrate or exclude the less restrictive view, whereas the less restrictive view includes within it the view that plaintiffs harmed by the U.S. effects can sue." Pet. App. A23. The majority found "most compelling," however, the prospect that an expansive interpretation of the FTAIA to allow persons like appellants to sue would maximize deterrence of international cartels by "forc[ing] the conspirator to internalize the full costs of his anticompetitive conduct." *Id.* at A30.

The majority further held that the appellants have antitrust standing. Pet. App. A31-A34. The court reasoned that "the arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here." *Id.* at A33.

Judge Henderson dissented. Pet. App. A37-A39. She disagreed with the majority's interpretation of the FTAIA, explaining that, "[n]otably, the word 'claim' in the [Act] refers to the specific claim asserted by the injured party." *Id.* at A37 n.2.

DISCUSSION

A. THE PANEL DECISION MERITS EN BANC REVIEW

1. The Fifth Circuit in *Statoil* held that "the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." 241 F.3d at 428. After a certiorari petition was filed in *Statoil*, the Supreme Court invited the Solicitor General to express the views of the United States. In response, the Solicitor General filed an amicus brief on behalf of the United States and Federal Trade Commission taking the position that the Fifth Circuit's decision in *Statoil* correctly interpreted the FTAIA to require that the anticompetitive effects on United States commerce give rise to a plaintiff's claimed injuries. Brief For The United States And The Federal Trade Commission As Amici Curiae, at 10-17, *Statoil ASA* v. *HeereMac v.o.f.*, No. 00-1842 (*Statoil* Br.).[5] The government's brief also explained that the Fifth Circuit's reading of the Act would not impair effective deterrence of antitrust violations or federal criminal enforcement of the antitrust laws against international cartels. *Id.* at 8-10. The government concluded, moreover, that the Fifth Circuit's decision did not warrant the Supreme Court's attention at that time because the decision was "the first appellate decision to address whether a plaintiff's antitrust claim involving foreign conduct must derive from that conduct's effect on domestic commerce." *Id.* at 5.

Since the filing of the government's *Statoil* brief, two courts of appeals have reached interpretations of the FTAIA that conflict with the Fifth Circuit's decision in *Statoil*. As the

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[5] For the Court's convenience, we attach as an addendum a copy of the government's amicus brief in *Statoil*.

panel observed (Pet. App. A4, A13-A14), the Second Circuit in *Kruman* rejected the view that the FTAIA "require[s] that the 'effect' on domestic commerce be the basis for the alleged injury suffered by a plaintiff," and instead held that the FTAIA's "language 'gives rise to a claim' only requires that the 'effect' on domestic commerce violate the substantive provisions of the Sherman Act." 284 F.3d at 399. Moreover, the majority's decision in the present case holds that the FTAIA permits a plaintiff to sue based on foreign injury arising from foreign conduct. That decision sharply contrasts with the Fifth Circuit's decision in *Statoil*, but also differs from the Second Circuit's decision in *Kruman*. See Pet. App. A19 ("Our view of the statute falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former.").

2. The government urges that this Court grant rehearing en banc because the majority's decision deepens a circuit split on an issue of exceptional and recurring importance regarding the scope of the antitrust laws. Fed. R. App. P. 35(b)(1)(B). With increasing frequency, foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items, when the conspiracy's conduct also affects United States commerce. *Statoil* Br. 7. Indeed, appeals involving the issue whether such suits are permissible under the FTAIA are under submission in the Third and Seventh Circuits. *BHP New Zealand Ltd.* v. *UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340 & 01-3991 (3d Cir. argued Mar. 11, 2003); *Metallgesellschaft AG* v. *Sumitomo Corp. of Am.*, No. 00-3700 (7th Cir. argued Sept. 5, 2001). The issue also has been addressed in many district court decisions. Reh'g Pet. 8 n.4 (collecting cases); *Statoil* Br. 7. The United States expects that similar suits will follow in light of the majority's holding in this case that the FTAIA does not bar such suits.

B. THE PANEL MAJORITY'S HOLDING IS INCONSISTENT WITH THE STATUTORY TEXT, HISTORY, AND PURPOSES

The government continues to adhere to the position set forth in its amicus brief in *Statoil* that the FTAIA bars a private suit when the plaintiff's claim does not arise from the domestic effects of the challenged anticompetitive conduct.

1. It is settled that the Sherman Act extends to foreign conduct with intended and substantial effects on United States commerce, and that the FTAIA provides for jurisdiction under the Sherman Act over a claim by a plaintiff that suffers injury arising from direct, substantial, and reasonably foreseeable anticompetitive effects of foreign conduct on United States commerce, whether the plaintiff is located in the United States or abroad. *Statoil* Br. 11. The panel has embraced the remarkable proposition, however, that the FTAIA allows a suit even when a plaintiff is injured overseas *and* the injury stems entirely from a conspiracy's effects overseas. The panel reached that result by a "literal" reading of the word "a" in Section 6a(2) to mean that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. A19. Read in context, however, the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim" is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court. *Statoil* Br. 12; *cf. Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties").

This interpretation is supported by principles of antitrust injury and standing embedded in the FTAIA. Section 6a(2) of the FTAIA requires that domestic effects of the conduct in question

"give[] rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2). In *Kruman*, the Second Circuit held that because the FTAIA amended the Sherman Act—not the Clayton Act—the FTAIA "only speaks to the question what conduct is prohibited, not which plaintiffs can sue." Pet. App. A20 (citing *Kruman*, 284 F.3d at 397-400). The panel majority correctly rejected that approach because "Congress referred to *both* prohibited conduct and plaintiffs' injury, importing concepts from both the Sherman and Clayton Acts, in *making* the nexus of 'conduct,' 'effect,' and 'claim' the key to FTAIA." *Id.* at A20; see also *Statoil* Br. 12-13.

The majority erred, however, in concluding that the statute requires merely that "*some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act," Pet. App. A22 (emphasis added), because Congress incorporated antitrust injury and standing concepts in the FTAIA. See House Report at 11 ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing."). To have a "claim," a plaintiff must show "antitrust injury"—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A contrary result would "divorce[] antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Id.* at 487.

The FTAIA's focus is on domestic effects of anticompetitive conduct. Its text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce. Thus, established principles of antitrust injury and standing inform a proper interpretation of the FTAIA's language and require that the plaintiff—not just someone—have a "claim" under the Sherman Act. Cf.

National Credit Union Admin. v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (describing zone-of-interest requirement for prudential standing).

2. The majority acknowledges that portions of the FTAIA's legislative history support the Fifth Circuit's interpretation of the Act, Pet. App. A23, A28, but concludes that, on the whole, the legislative history favors an expansive interpretation because nothing in the history affirmatively "denigrate[s] or exclude[s]" an expansive interpretation, *id.* at A23. The majority thus assumes that, in the absence of express legislative history to the contrary, Congress must have intended the more expansive interpretation—a dubious analytical approach to a statute that was prompted in significant part by a perceived need to clarify the limitations of the Sherman Act's reach over international transactions. House Report at 2. The salient point is that nothing in the Act's legislative history speaks to the issue of foreign purchasers whose injuries do not arise from a conspiracy's effects on domestic commerce. The majority's interpretation of what the legislative history "implicitly assumes," Pet. App. A25, is simply unavailing because there is no indication that Congress had in mind the scenario occurring here—foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods. See *Statoil*, 241 F.3d at 429 n.28 ("Nothing is said about protecting foreign purchasers in foreign markets.") (quoting *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 715 (D. Md. 2001)).

The Supreme Court's decision in *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), provides the relevant context for all of the House Report passages cited by the majority. See House Report at 10 (citing *Pfizer*). *Pfizer* did not address the jurisdictional reach of the antitrust laws. Rather, it held that a foreign government that purchased goods from United States companies is a "person" "entitled to sue for treble damages under the antitrust laws to the same

extent as any other plaintiff." 434 U.S. at 320. As discussed above, there is no dispute that the FTAIA permits suits by foreign purchasers who are injured by *domestic* anticompetitive effects of illegal conduct. Those plaintiffs, however, are markedly different from foreign purchasers who "bought [goods] exclusively outside the United States" and whose injuries arise exclusively from overseas conduct. Pet. App. A9.

3. a. We further disagree with the majority's reliance (Pet. App. A30) on what it considered a "most compelling" rationale: that its expansive interpretation of the FTAIA is necessary to deter international cartels from harming United States commerce. The majority reasons that allowing foreign plaintiffs to sue for treble damages in U.S. district court for foreign injuries suffered by defendants' foreign conduct "forces the conspirator to internalize the full costs of his anticompetitive conduct." *Ibid.* The paramount purpose of the United States' antitrust laws, however, is to protect consumers, competition, and commerce in the United States. *Pfizer*, 434 U.S. at 314 ("Congress' foremost concern in passing the antitrust laws was the protection of Americans."). Although the Court in *Pfizer* observed that "suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers," *ibid.*, the Court's decision in *Pfizer*, as we have pointed out, involved foreign purchasers injured by anticompetitive *domestic* conduct and effects. The Court did not intimate that the purposes of the antitrust laws would support the availability of a private treble damages action when foreign injury is sustained exclusively as a result of *foreign* conduct.

The Supreme Court has made clear that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). The Department of Justice follows that admonition in

prosecuting international cartels by focusing on domestic commerce when calculating fines under the Sentencing Guidelines. See *Statoil* Br. 8-10. Similarly, for private plaintiffs, that admonition is appropriately followed by providing a cause of action only for such plaintiffs—domestic and foreign—who suffer injury from a conspiracy's effect on domestic commerce.[6]

Moreover, policy considerations based on deterrence counsel *against* the panel's expansive interpretation of the FTAIA that permits suits for injuries sustained abroad that arise from foreign conduct. Price-fixing conspiracies are inherently difficult to detect and prosecute. Cooperation by a co-conspirator, through provision of documents or testimony, thus is often vital to law enforcement. To induce such cooperation, the Antitrust Division of the Department of Justice maintains a robust *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993), that offers strong incentives to co-conspirators who elect voluntarily to disclose their criminal conduct and cooperate with prosecutors. That policy has proven indispensable in government antitrust enforcement; it is the number one source of leads for breaking up international cartels—including the vitamins cartel that is the subject of this case—that continue to injure American consumers.

Under the policy, the first cooperating corporation (and its officers) may receive amnesty from *criminal* prosecution. 4 Trade Reg. Rep. (CCH) ¶ 13,113 at 20,649-21, 20,649-22. They remain subject, however, to private actions seeking treble damages under 15 U.S.C. 15(a). Thus, potential amnesty applicants weigh their civil liability exposure when deciding whether to avail

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[6] The majority's decision also ignores the striking change in the legal landscape since *Pfizer*. Not only has Congress enhanced the penalties available against cartels, but there has been a marked growth in foreign antitrust statutes and enforcement, particularly in the last decade. *Statoil* Br. 15-16; Reh'g Pet. 4-5.

themselves of the government's amnesty policy. Without question, "private suits provide a significant supplement . . . to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter Corp.* v. *Sonotone*, 442 U.S. 330, 344 (1979). The rule adopted by the majority, however, would effect a sea change in the number and type of private actions permitted under the Sherman Act. We are aware of no other country whose antitrust laws provide for treble damages. By permitting suits for treble damages by overseas plaintiffs whose injuries arise from overseas conduct, the majority's decision, if allowed to stand, would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency under the Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement. The panel's decision thus threatens to impair the ability of the government to seek criminal penalties, and of private parties (whether located here or overseas) to seek treble damages for injuries stemming from a conspiracy's anticompetitive effects on commerce *in the United States*. Such a decrease in effective enforcement of the antitrust laws, therefore, has the potential to weaken deterrence—the opposite of what the panel intended. Pet. App. A28-A31.

b. There are additional countervailing policy reasons to require that a plaintiff's injury arise from a conspiracy's anticompetitive domestic effects. The rule embraced by the majority threatens to burden the federal courts in the United States with suits seeking to recover for injuries sustained abroad and arising exclusively from foreign conduct and foreign anticompetitive effects. Under the panel's decision, the critical inquiry is whether a conspiracy's effect on domestic commerce "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. A19. The majority does not explain how that

determination is to be made when the party who suffered the relevant injury is not "before the court." *Ibid*. It is clear, however, that once *any* plaintiff is determined to have a claim arising from an injury sustained by the domestic anticompetitive effects of a conspiracy, the rule embraced by the panel would permit any foreign purchaser to bring suit for treble damages in the district courts of the United States, even when the purchaser is "injured solely by that [conspiracy's] effect on foreign commerce." *Id.* at A5.

We are unaware of any decision pre-dating the FTAIA that permitted such suits. Congress passed the FTAIA to "exempt from the Sherman Act export transactions that did not injure the United States economy," *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 n.23 (1993), and to create a "single, objective test—the 'direct, substantial, and reasonably foreseeable effect' test" to "serve as a simple and straightforward clarification of *existing* American law," House Report, *supra*, at 2 (emphasis added). Congress did not intend the sweeping change brought about by the rule adopted by the majority, which would open the district courts of the United States to suits to recover for injuries suffered abroad solely as a result of a conspiracy's effect on foreign commerce.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted.

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March 24, 2003

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. app. P. 32(a)(7), Local Rule 32(a)(1), and the Court's Order of March 7, 2003 because it has been prepared in a proportionally spaced typeface using WordPerfect 10 in 12-point Times New Roman.

Adam D. Hirsh

Dated: March 24, 2003

ADDENDUM

No. 00-1842

In the Supreme Court of the United States

STATOIL ASA, PETITIONER

v.

HEEREMAC V.O.F., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether federal courts have jurisdiction under the Sherman Act and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 1, 6a, over the claims of a foreign plaintiff that it has been injured by a conspiracy that has direct, substantial, and reasonably foreseeable anticompetitive effects on United States trade or commerce, if the foreign plaintiff's claimed injury does not arise from those domestic effects.

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In the Supreme Court of the United States

No. 00-1842

STATOIL ASA, PETITIONER

v.

HEEREMAC V.O.F., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1997, the United States uncovered a global price-fixing and market-allocation scheme in the heavy-lift marine construction services industry. Oil and gas companies engage heavy-lift marine construction firms to construct, install, move and remove offshore oil and gas production platforms, decks, and similar structures. Such firms use heavy-lift derrick barges, which are floating crane vessels able to lift loads exceeding 4,000 tons. Between 1993 and May 1997, respondents HeereMac, v.o.f., Saipem UK Limited, and McDermott, Inc., and their affiliates, controlled the world's supply of heavy-lift derrick barges. Pet. App. 4a-5a. Those three

companies are based in The Netherlands, the United Kingdom, and the United States, respectively. *Id.* at 5a n.2. In December 1997, the United States charged respondent HeereMac and one of its managing directors with participating in a conspiracy to rig bids for heavy-lift barge services in the United States and elsewhere, in violation of Section 1 of the Sherman Act. 15 U.S.C. 1. The corporation and individual pleaded guilty and agreed to pay fines of $49 million and $100,000, respectively. Pet. App. 6a, 56a, 57a.

In December 1998, petitioner, an oil company owned by the government of Norway, brought suit seeking treble damages for overcharges it allegedly paid to respondents HeereMac and Saipem for heavy-lift barge services in the Norwegian sector of the North Sea. Pet. App. 7a; Pet. 4-5. Petitioner purchased no heavy-lift barge services in the United States, nor did it purchase any such service from McDermott, the only U.S.-based respondent. Rather, its contracts with HeereMac and Saipem were executed and performed abroad and did not specify that United States law applied to disputes arising under those contracts. Pet. App. 5a n.3, 6a n.5.

2. The district court dismissed petitioner's suit on the ground that the alleged conspiracy to fix prices in the North Sea "did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce," and thus that the court lacked subject matter jurisdiction under Section 6a(1) of the Foreign Trade Antitrust Improvements Act of

1982 (FTAIA), 15 U.S.C. 6a(1). Pet. App. 51a.[1] The court also observed that petitioner "was allegedly injured outside the United States by [respondents'] bid rigging on jobs located in the Norwegian sector of the North Sea having no direct, substantial effect on United States commerce." *Id.* at 52a. The court accordingly held that petitioner lacked standing to bring its claim, reasoning that the "United States antitrust laws do not extend to protect foreign markets from anticompetitive effects and 'do not regulate the competitive conditions of other nations' economies.'" *Ibid.* (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986)).

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[1] The FTAIA, which in 1982 became a part of the Sherman Act, provides:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> [*Proviso*] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1) (B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. 6a.

3. a. A divided panel of the Court of Appeals for the Fifth Circuit affirmed. Pet. App. 1a-22a. The court observed that the FTAIA extends the Sherman Act to non-import foreign conduct only when that conduct has "a direct, substantial, and reasonably foreseeable effect" on United States domestic commerce, 15 U.S.C. 6a(1), and "such effect gives rise to a claim," under the Sherman Act, 15 U.S.C. 6a(2). The court concluded that the alleged conspiracy had a sufficient effect on United States commerce within the meaning of Section 6a(1), because petitioner had alleged that "the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-competitive prices for oil." Pet. App. 13a-14a. The court held, however, that the district court nonetheless lacked subject matter jurisdiction under Section 6a(2) because petitioner's claimed injury—inflated prices that it paid for heavy-lift services in the North Sea—did not arise from the anticompetitive effects on United States commerce. *Id.* at 16a n.26.[2]

The court concluded that the FTAIA requires that "the effect on United States commerce * * * must give rise to the claim that [petitioner] asserts against [respondents]." Pet. App. 14a. A contrary reading of the Act, the court explained, would invite plaintiffs

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[2] The court also expressed (Pet. App. 12a) its "doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act," which applies to "trade or commerce with foreign nations." 15 U.S.C. 1. The court stated that "[t]he commerce that gives rise to the action here—the contracting for heavy lift barge services in the North Sea—was not United States commerce *with* foreign nations, but commerce *between* or *among* foreign nations." Pet. App. 12a.

worldwide to "flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." *Id.* at 15a-16a.

b. Judge Higginbotham dissented. Pet. App. 22a-38a. In his view, Section 6a(2)'s reference to "*a* claim," rather than the "*plaintiff's* claim," means that the FTAIA confers jurisdiction whenever a conspiracy's conduct has direct, substantial, and reasonably foreseeable effects on U.S. commerce, and those domestic effects give rise to *a* claim by *some* party, even if not the plaintiff. *Id.* at 24a-26a. Judge Higginbotham reasoned that, once jurisdiction is established over the conspiracy's conduct as a whole, a plaintiff may bring suit in federal court to redress foreign injury allegedly suffered as a result of the conspiracy's effects on foreign commerce. *Id.* at 23a, 30a.

DISCUSSION

The decision in this case is the first appellate decision to address whether a plaintiff's antitrust claim involving foreign conduct must derive from that conduct's effect on domestic commerce. Appeals that raise the same issue are pending in five other courts of appeals. Thus, even if the issue otherwise warranted this Court's review, it would not be ripe for review at this time. Nor is there any basis for concluding that the Fifth Circuit's decision will impair the United States' efforts to enforce the Sherman Act against international cartels. The court of appeals was, moreover, correct in holding that the FTAIA requires that the anticompetitive effects on United States commerce must give rise to a plaintiff's claimed injuries.

A. THE ISSUE DECIDED BY THE COURT OF APPEALS IS NOT RIPE FOR THIS COURT'S REVIEW

1. Petitioner argues (Pet. 24-26) that the Court's review is warranted to resolve a conflict between the Fifth Circuit's decision and the District of Columbia Circuit's decision in *Caribbean Broadcasting System, Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080 (1998). See also Pet. App. 55a (statement of Higginbotham, J., on denial of rehearing en banc). We disagree. In *Caribbean Broadcasting*, the plaintiff, which owned a radio station in the Eastern Caribbean (which includes Puerto Rico and the U.S. Virgin Islands), sued the owner of several competing radio stations and its joint venture partner for violations of the Sherman Act. The court of appeals held that the plaintiff had averred a "direct, substantial, and reasonably foreseeable effect" on United States commerce within the meaning of Section 6a(1), because the plaintiff allegedly had been foreclosed from selling advertisements to customers in the United States. *Id.* at 1086. That holding was limited to whether the plaintiff had alleged a sufficient impact on domestic commerce, and the court of appeals did not address whether the alleged domestic effect "gave rise" to plaintiff's claim. Indeed, the decision does not refer to Section 6a(2). See also Pet. App. 20a-21a & n.31 (distinguishing *Caribbean Broadcasting* and explaining that the claim in that case arose from an alleged effect on domestic commerce).[3]

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[3] Petitioner also errs in contending (Pet. 22-24) that the Fifth Circuit's decision conflicts with *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993). That decision neither interpreted Section 6a(2) of the FTAIA, cf. *id.* at 796 n.23, nor considered

2. Although the decision below is the first appellate decision to interpret Section 6a(2), with increasing frequency foreign plaintiffs have sued to recover damages arising out of foreign purchases of conspiratorially price-fixed items, when the conspiracy's conduct also affects United States commerce. To date, no district court that has considered the application of Section 6a(2) to such facts has embraced petitioner's reading of the Act. See, *e.g.*, *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 704 (E.D. Pa. 2001) (citing cases); see also *Galavan Supplements, Ltd.* v. *Archer Daniels Midland Co.*, No. C97-3259 FMS, 1997 WL 732498, at *2, *3-*4 (N.D. Cal. Nov. 19, 1997) (dismissing for lack of standing). Five decisions considering the issue are pending on appeal in the District of Columbia, Second, Third, Seventh, and Ninth Circuits. *Empagran, S.A.* v. *F. Hoffman-La Roche, Ltd.*, No. 01-7115 (D.C. Cir. filed July 25, 2001); *Kruman* v. *Christie's Int'l PLC*, No. 01-7309 (2d Cir. argued Oct. 3, 2001); *BHP New Zealand, Ltd.* v. *UCAR Int'l, Inc.*, Nos. 01-3329, 01-3340, & 01-3991 (3d Cir. filed Aug. 29, 2001) (appeals from the *Ferromin* decision); *Metallgesellschaft AG* v. *Sumitomo Corp. of Am.*, No. 00-3700 (7th Cir. argued Sept. 5, 2001); *Litton Systems, Inc.* v. *Honeywell, Inc.*, No. 99-56892 (9th Cir. argued Mar. 5, 2001). Resolution of those appeals will likely provide further illumination concerning the question presented and may or may not generate a conflict in the circuits warranting this Court's review. Review by this Court at the present time accordingly would be premature.[4]

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whether the Sherman Act extends to foreign injury that lacks a connection to United States commerce.

[4] Petitioner mistakenly suggests (Reply Br. 4) that this case uniquely alleges a global conspiracy that includes geographic

B. THE COURT OF APPEALS' DECISION DOES NOT ADVERSELY AFFECT THE GOVERNMENT'S ENFORCEMENT OF THE SHERMAN ACT

Petitioner argues (Pet. 18-21) that, because the Sherman Act has the same jurisdictional reach in both civil and criminal cases, see *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998), this Court's review is necessary to prevent the Fifth Circuit's decision from impairing the government's ability to enforce the Sherman Act. That contention lacks merit.

1. The Fifth Circuit's holding that a plaintiff's claim must derive from the conspiracy's effect on domestic commerce does not preclude the government from prosecuting violations of the Act by global cartels. District courts have jurisdiction over illegal foreign activity that has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. 6a(1). When an international cartel's conduct as a whole has that effect, "such effect gives rise" to the United States' "claim" under the Act. 15 U.S.C. 6a(2); see also Pet. App. 21a (noting that global conspiracy that has the effect of raising prices in the United States gives rise to a government claim).

2. Petitioner also errs in suggesting (Pet. 18-20) that the Fifth Circuit's decision may inappropriately reduce the size of fines the United States can recover under the Sentencing Guidelines, which instruct courts to use "20 percent of the volume of affected commerce" in establishing a Base Fine. Sentencing Guidelines § 2R1.1(d)(1). It is the policy of the United States to

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market allocation. Other cases contain similar allegations. See, *e.g.*, *Ferromin*, 153 F. Supp. 2d at 701-702; *Empagran*, 2001 WL 761360, at *2.

calculate the Base Fine by using only the domestic commerce affected by the illegal scheme, and in all but two of the dozens of international cartel cases prosecuted (see p. 10 & note 5, *infra*), fines obtained by the government were based solely on domestic commerce. Gary R. Spratling, *Negotiating The Waters Of International Cartel Prosecutions: Antitrust Division Policies Relating To Plea Agreements In International Cases* 14-15 (Mar. 4, 1999) (speech by Deputy Assistant Attorney General for Criminal Enforcement), *available at* <http://www.usdoj.gov/atr/public/speeches/2275. htm>. The Base Fine is then adjusted by minimum and maximum multipliers that are derived from a culpability score. Guidelines §§ 8C2.5 and 8C2.6. Using that framework, the United States has obtained very large fines against international cartels. In the last five years, fines of $10 million or more have been imposed against 35 domestic and foreign-based corporations, including six fines of $100 million or more, and one fine of $500 million, which represents the largest criminal fine ever obtained by the Department of Justice under any statute.

Moreover, and consistent with the Fifth Circuit's decision, a court may consider the foreign commerce affected by the illegal conduct when the amount of affected domestic commerce understates the seriousness of the defendant's role in the offense and, therefore, the impact of the defendant's conduct on United States consumers. In that circumstance, the court may take into account the defendant's worldwide sales affected by the conspiracy in making an upward departure in a defendant's sentence under Guideline § 5K2.0. See 18 U.S.C. 3553(b) (permitting sentence in excess of Guidelines range when court finds "that there exists an aggravating * * * circumstance of a kind, or to a

degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

The United States has used that approach in negotiating two plea agreements, one of which involved the conduct that is the subject of petitioner's suit. The government and respondent HeereMac, v.o.f. agreed to increase the fine by $20 million after taking into account the company's foreign sales of heavy-lift barge services of more than $1 billion as a more accurate indication of the defendant's culpability. The United States did not, however, simply plug the company's foreign sales into the Base Fine calculation of § 2R1.1(d)(1)—which would have yielded a fine exceeding $240 million—nor has it ever treated foreign sales in that way. Rather, the level of foreign sales was used as an indication of the company's culpability and that approach yielded a total fine of $49 million. See Pet. App. 56a, 60a-63a. That type of vigorous enforcement of the Sherman Act against international cartels will continue unimpaired by the Fifth Circuit's decision.[5]

C. THE COURT OF APPEALS' HOLDING IS CONSISTENT WITH THE STATUTORY TEXT, HISTORY, AND PURPOSES

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * *

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[5] The other instance in which a negotiated fine partially reflected foreign sales was *United States* v. *Roquette Freres*, Crim. No. CR 97-00356 (N.D. Cal. 1997), in which the defendant's United States market share was relatively small compared to its share of the worldwide market. Based on defendant's volume of United States commerce of $2.6 million, the corresponding Guidelines fine range was $748,000 to $1,282,000. The court imposed the agreed-upon fine of $2.5 million.

with foreign nations." 15 U.S.C. 1. Although Congress generally intends that its laws apply only within the territorial jurisdiction of the United States, *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993); *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582-583 n.6 (1986); see also *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (1st Cir. 1997) (holding that Sherman Act's criminal provisions apply to wholly foreign conduct with intended and substantial domestic effects).

In amending the Sherman Act in 1982, Congress in the FTAIA provided that the Sherman Act applies to import commerce, in a more limited way to United States export commerce, and to foreign conduct when "(1) such [foreign] conduct has a direct, substantial, and reasonably foreseeable effect * * * on [United States domestic commerce] * * * and (2) such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a. It is not disputed in this case that Section 6a confers subject matter jurisdiction over a plaintiff's claim that arises from an illegal conspiracy's anticompetitive effects on domestic commerce, whether the plaintiff is located here or abroad. Pet. App. 14a n.22 & 16a n.25; cf. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978) (holding that a foreign country may sue under the Sherman Act). The question presented in this case is whether the Sherman Act applies "where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." Pet. App. 16a. The Fifth Circuit properly answered that question in the negative.

1. a. Section 6a(1) of the FTAIA provides that the Sherman Act extends to foreign non-import conduct only when it has a sufficient effect on United States commerce. 15 U.S.C. 6a(1). Section 6a(2) further requires that "such effect gives rise to a claim" under the Sherman Act. 15 U.S.C. 6a(2).

Petitioner argues (Pet. 10-13) that, because Section 6a(2) states that the requisite effects on United States commerce must give rise to "a" claim, a plaintiff need only point to the existence of some other party's viable claim arising from the same conduct that injured the plaintiff, even though the plaintiff's claimed injury has no connection to United States commerce. Read in context, however, the most natural reading of Section 6a(2)'s requirement that "such effect gives rise to a claim," is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court. See *Textron Lycoming Reciprocating Engine Div. AVCO Corp.* v. *UAW*, 523 U.S. 653, 657 (1998) (noting "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used") (internal quotation marks omitted); cf. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, * * * the plaintiff * * * cannot rest his claim to relief on the legal rights or interests of third parties.").

b. The Fifth Circuit's decision also comports with principles of antitrust injury and standing that ensure that the antitrust laws redress only the type of injury that the laws were designed to prevent. By requiring that the effect on domestic commerce must "give[] rise to a claim," 15 U.S.C. 6a(2), Congress incorporated

general concepts of antitrust injury and standing into the FTAIA. See H.R. Rep. No. 686, 97th Cong., 2d Sess. 11 (1982) ("[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing"). To establish standing to seek relief under the Sherman Act, a plaintiff must show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A contrary result would "divorce antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so." *Id.* at 487; cf. *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (describing prudential standing requirement that a plaintiff's interest must arguably fall within the zone of interests to be protected by statute).

The FTAIA's text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce. To the contrary, the FTAIA is concerned with foreign conduct that affects commerce *in the United States*. 15 U.S.C. 6a(1). Indeed, the paramount purpose of the United States' antitrust laws is to protect consumers, competition, and commerce in the United States. See *Pfizer*, 434 U.S. at 314 ("Congress' foremost concern in passing the antitrust laws was the protection of Americans."). That purpose is served by applying the Sherman Act to foreign conduct when it has a "direct, substantial, and reasonably foreseeable effect" on United States commerce and "such effect gives rise" to the plaintiff's claim. 15 U.S.C. 6a(1) and (2). That purpose is not

served when the plaintiff's injuries have no nexus to United States commerce.[6]

Indeed, petitioner's interpretation of Section 6a would expand the jurisdiction of the Act in ways that Congress could not have intended. Consider, for example, an international price-fixing cartel with wholly foreign members that had annual foreign sales of $2 billion to 50 foreign customers, and annual sales in the United States of $1 million to one U.S. customer. Under petitioner's construction, because the domestic customer could sue based on the conspiracy's requisite domestic effects, all 50 foreign customers could bring treble-damages actions in federal court, "even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." Pet. App. 15a-16a.

2. Petitioner contends (Pet. 12-13) that the legislative history of Section 6a manifests a purpose to extend the jurisdictional reach of the Sherman Act to foreign injury with no connection to United States commerce. The House Report indicates, however, that Congress inserted Section 6a(2) merely to ensure that the covered foreign conduct must have an *anticompetitive* impact on domestic commerce to be actionable under

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[6] As the court of appeals recognized (Pet. App. 14a n.22 & 16a n.25), the antitrust laws protect all participants in United States commerce, regardless of nationality. Moreover, the Department of Justice and the Federal Trade Commission, the federal agencies charged with the responsibility of enforcing the antitrust laws, "do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties." U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Enforcement Guidelines For International Operations* § 2 (Apr. 1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, at 20,589-20,592.

the Sherman Act. H.R. Rep. No. 686, 97th Cong., 2d Sess. 11-12 (1982). Absent that subsection, the House Report explains, a plaintiff injured abroad might have been able to bring suit in federal court "merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment." *Id.* at 11; see also *id.* at 18. Although the House Report further indicates a legislative intent to extend antitrust protection to foreign purchasers in the "*domestic* marketplace," *id.* at 10, nothing in the FTAIA's history addresses foreign purchasers, such as petitioner, whose injuries are not linked to a conspiracy's effects on domestic commerce.

3. Petitioner also argues (Pet. 16-20) that its construction is necessary to ensure adequate deterrence of international cartels. The Fifth Circuit's holding, however, reads Section 6a broadly to extend to all plaintiffs (whether domestic or foreign) whose injuries arise from a conspiracy's anticompetitive effect on United States commerce. That holding does not undermine the Sherman Act's protection of United States consumers and commerce.

Indeed, the legal landscape in recent years has changed significantly in response to the need to deter illegal cartels operating both here and abroad. In 1974, Congress raised the statutory maximum corporate fine for a violation of the Sherman Act from $50,000 to $1 million. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708. In 1990, Congress increased that amount ten-fold, to $10 million. Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2880. Moreover, since 1987, defendants may be fined up to twice the gross gain from the offense or twice the gross loss to victims of the offense if those

amounts exceed the maximum fine authorized under the Sherman Act. 18 U.S.C. 3571.

There also has been a marked growth in foreign antitrust statutes in the last decade. Today, approximately 90 countries have laws protecting competition. A. Douglas Melamed, *An Address to the 27th Annual Conference on International Antitrust Law and Policy, on the Subject of Promoting Sound Antitrust Enforcement In The Global Economy* 5 (Oct. 19, 2000), *available at* <http://www.usdoj.gov/atr/public/speeches /6785.htm>. Although it remains to be seen how vigorously foreign nations will implement or enforce their new antitrust laws—and therefore how substantial their deterrent effect will be—their existence counsels caution in extending the reach of United States antitrust laws, and makes it all the more appropriate for this Court to allow further development of the present issue in the lower courts. Of particular relevance here, Norwegian law provides for criminal prosecution and private actions in response to anticompetitive conduct, and petitioner has filed a civil action against respondents under Norwegian law. Pet. 10 n.8.[7]

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[7] The global response to the international "bulk vitamins cartel" well illustrates energetic enforcement efforts against cartels operating worldwide. The United States negotiated plea agreements with eleven corporate defendants and obtained fines of approximately $900 million. Those defendants also have paid hundreds of millions of dollars to domestic purchasers of vitamins, and further litigation continues. *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867 (D.D.C. Mar. 31, 2000). In addition, European Union, Canadian, and Australian authorities obtained record fines against vitamin suppliers. European Commission, *Commission imposes fines on vitamin cartels, available at* <http://europa.eu.int/comm/competition/index_en.html> (over $750 million in fines); Australian Competition & Consumer Comm'n, *Federal Court Imposes Record $26M Penalties Against Vitamin Suppliers*

* * * * *

In sum, the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. The decision will not impair the United States' ongoing efforts to enforce the Sherman Act against international cartels, and it is correct in its interpretation of the FTAIA. Moreover, because appeals raising basically the same legal question are currently pending in five other courts of appeals—whose decisions could provide further illumination—review by this Court would be premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2002

(Mar. 1, 2001), *available at* <http://203.6.251.7/accc.internet/media/search/view_media.cfm?RecordID=267>; Canadian Competition Bureau, *Fines in Order of Magnitude-Competition Act*, *available at* <http://strategis.ic.gc.ca/SSG/ ct01709e.html>.

CERTIFICATE OF SERVICE

I certify that on March 24, 2003, two true and correct copies of the Brief For The United States And The Federal Trade Commission As Amici Curiae In Support Of Petition For Rehearing En Banc were served, by first-class mail and by electronic mail, on:

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